REMARKS

The Examiner's attention to the present application is noted with appreciation.

Claim Objection

On page 2 of the Office Action of July 31, 2006, the Examiner objected to claim 87 as being dependent on a cancelled claim. Applicant has cancelled claim 87.

Rejection under 35 U.S.C. 112

On page 2 of the Office Action, the Examiner rejected claim 7 under 35 U.S.C. 112, first paragraph, stating that Applicant claims said oil being unmixed with the fermentation mixture, but noting that Applicant's specification discloses blending the fermentation products and by-products into an oil, which may add new matter. The rejection is traversed.

The Examiner bases the rejection on the specification on page 7, lines 1-2 which states, "[b]lending the volatile fermentation products and by-products into an oil comprises blending the fermentation extract containing the volatile fermentation products and by-products into an oil...."

However, Applicant notes that the specification on page 6, lines 20-23, discloses that the fermentation products and by-products are extracted from the fermentation medium by disposing a layer of oil over the fermentation medium (as noted below in more detail, claim 7 has been amended to clarify the layering of oil onto the fermentation mixture), heating the oil and fermentation medium, and separating the oil phase from the water phase. The fermentation medium ultimately forming the fermentation mixture is not the fermentation products and by-products. Therefore, claim 7 is supported by the specification given that the oil is described as being layered on the fermentation medium and mixing of the two is not described in the specification. Applicant has amended claim 7 to recite the word "extracted" to clarify that the fermentation products and by-products are extracted from the fermentation mixture. No new matter has been added.

On page 3 of the Office Action, the Examiner rejected claim 8 stating that there is insufficient antecedent basis for the limitation "the inoculum". Applicant has replaced "inoculum" with "composition" and has added some clarifying language.

Rejection under 35 U.S.C. 102(b)

On page 3 of the Office Action, the Examiner rejected claims 7, 20, and 24-29 under 35 U.S.C. 102(b) as being anticipated by Tien-Lai (GB 2 191 929 A). The rejection is traversed. The Examiner maintains that because oil is present in the mixture of Tien-Lai, it would be layered on the oil. However, as noted above with regard to the rejection based on 35 U.S.C. 112, the oil is layered on the fermentation medium to extract fermentation products. No mixing is described by Applicant. Tien-Lai involves mixing and such mixing cannot be considered to be like the layering of the present invention.

Applicant recites a discrete layer of oil on the fermentation mixture and thus the structure of the present invention as recited in claim 7 is not like the structure of Tien-Lai because all the ingredients of Tien-Lai are mixed. As discussed with the Examiner, claim 7 has been amended to clarify that the composition that is claimed comprises the oil layered on the fermentation mixture. The fermentation mixture comprises the yeast, the *Capsicum sp*. cultivar in water; and the nutrient mixture . The oil is not a component of the fermentation mixture, but rather is layered on the fermentation mixture. Given that Tien-Lai describes a mixture that is baked underscores the type of mixing that occurs in Tien-Lai that is distinguishable from the present invention.

Therefore, claim 7 is believed to be patentable. Claims 20 and 24-29 are dependent on claim 7 and so are also believed to be patentable.

Rejections under 35 U.S.C. 103(a)

The Examiner also rejected claims 7-8, 20-34, 37, 83-84, and 87 under 35 U.S.C. 103(a) as being unpatentable over Tien-Lai, Flenø et al. (U.S. 5,972,642), and Todd (U.S. 6,074,687). The rejection is traversed. For the same reasons given above, a combination of the cited references would not result in the present invention. As noted above, the mixture of Tien-Lai and the present invention are structurally distinguishable and there is no motivation or teaching to combine the cited references.

Therefore, claim 7 is believed to be patentable as are dependent claims 8, 20-34, 37, and 83-84.

The Examiner also rejected claims 7-8, 20-34, 84, and 87 under 35 U.S.C. 103(a) as being unpatentable over JP-08099813 A in view of Flenø et al. The rejection is traversed. For the same reasons given above, there would be no motivation to make the combination yielding the present invention, nor would the combination of the cited references result in the present invention.

Therefore, claim 7 is believed to be patentable as are dependent claims 8, 20-34, and 84.

In view of the above amendments and remarks, it is respectfully submitted that all grounds of rejection and objection have been traversed. It is believed that the case is now in condition for allowance and same is respectfully requested.

Authorization is given to charge payment of such additional fees, or credit any overpayment, to Deposit Acct. 13-4213.

If any issues remain, or if the Examiner believes that prosecution of this application might be expedited by discussion of the issues, the Examiner is cordially invited to telephone the undersigned.

Respectfully submitted,

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By: _____
Vidal A. Oaxaca, Reg. No. 44,267
Direct line: (505) 998-1505

PEACOCK MYERS, P.C.
Attorneys for Applicant(s)
P.O. Box 26927
Albuquerque, New Mexico 87125-6927

Telephone: (505) 998-1500
Facsimile: (505) 243-2542

Customer No. 005179